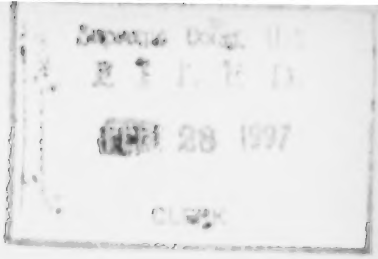

No. 96-859

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

STEVEDORING SERVICES OF AMERICA
and
EAGLE PACIFIC INSURANCE COMPANY,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR, and CHARLES S. SPROULL,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

RESPONDENT CHARLES S. SPROULL'S ANSWER TO PETITION FOR WRIT OF CERTIORARI

Charles Robinowitz
Counsel of Record
2962 Pacwest Center
1211 S.W. Fifth Avenue
Portland, OR 97204
(503) 226-1464
Attorney for Respondent Charles S. Sproull

23 pp

TABLE OF CONTENTS

	Pages
JURISDICTION AND STATUTES INVOLVED . .	1
CLAIMANT'S RESPONSE TO STATEMENT OF CASE	1
1. *Claimant's Injury and its Consequences*	1
2. *Average Weekly Wage Issue*	3
3. *Penalty Issue*	4
REASONS FOR NOT GRANTING THE PETITION FOR CERTIORARI.	4
1. *The inclusion of the claimant's 1984 vacation pay in his pre-injury earnings is consistent with the language of 33 U.S.C. § 910 (c) and does not conflict with the rulings of other circuits*	5
2. *The court of appeals holding regarding the claimant's post-injury wage earning capacity is reasonable and logical and every circuit which has discussed this issue agrees with the Ninth Circuit ruling*	8
3. *The Longshore and Harbor Workers' Compensation Act compels a penalty for failure to pay an award of interest within ten days and there is no conflict in the circuits on this issue*	12
CONCLUSION	19

TABLE OF AUTHORITIES

Pages

CASES

Devillier v. National Steel and Shipbuilding Co.,
10 BRBS 649, 657 (1979) 9

Foundation Constructors, Inc., v. Director, OWCP,
950 F.2d 621 (9th Cir. 1991) 15

Grant v. Portland Stevedoring Co.,
16 BRBS 267 (1984), *aff'd on reconsideration*,
17 BRBS 20 (1985) 16

La Faille v. Benefits Review Board,
884 F.2d 54, 61 (2d Cir. 1989). 9

McCabe v. Sun Shipbuilding & Dry Dock Co.,
602 F.2d 59, 63 (3d Cir. 1979). 9

Metropolitan Stevedore Co. v. Rambo,
515 U.S. ___, 115 S.Ct. 2144, 2150,
132 L.Ed 2d 226 (1995). 6

Quave v. Progress Marine, 912 F.2d 798
(5th Cir. 1990), *cert. denied*, 500 U.S. 916 (1991) . . 15

Strachan Shipping Co. v. Wedemeyer,
452 F.2d 1225 (5th Cir. 1971), *cert. denied*,
406 U.S. 958 (1972). 15

Thompson v. Potashnick Construction Co.,
812 F.2d 574 (9th Cir. 1987) 15

Tri-State Terminals v. Jesse, 596 F.2d 752 (7th Cir. 1979) 6

Walker v. Washington Metropolitan Area Transit Authority, 793 F.2d 319 (D.C. Cir.), *cert denied*, 479 U.S. 1094 (1986) 6,9

Watkins v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 556 (1978), *aff'd in pertinent part and rev'd on other grounds, sub nom., Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979) 15

White v. Bath Iron Works Corp., 812 F.2d 33, 35 (1st Cir. 1987) 9,10

STATUTES AND RULES

Longshore and Harbor Workers' Compensation Act
33 U.S.C. § 902 (12) 4

33 U.S.C. § 910 (c) 5

33 U.S.C. § 914 (f) 4, 5, 12, 15

33 U.S.C. § 921 (c) 14

33 U.S.C. § 921 (d) 15

Public Law 92-576, 86 Stat. 1251, effective October 27, 1972 16

Public Law 98-426, 98 Stat. 1654, effective September 28, 1984 16

JURISDICTION AND STATUTES INVOLVED

Claimant agrees with the petitioner's (herein "carrier") statement of jurisdiction and statutes involved in this case.

CLAIMANT'S RESPONSE TO STATEMENT OF CASE

The carrier's statement of the case is not complete or accurate. The claimant wishes to add the following:

1.

Claimant's Injury and its Consequences

After Mr. Sproull returned to work as a longshoreman on September 16, 1985, he had a significant physical impairment of his left shoulder due to his rotator cuff tear and subsequent surgical repair. His treating orthopedist, Dr. Lawrence Cohen, found he had an approximate 20 percent loss of strength in the shoulder, and the carrier's orthopedist, Dr. Lawrence Langston, measured the impairment as seven percent of the shoulder. Cl. Ex. 15, pp. 25-26; Emp. Ex. 22, p. 26; App. C-3.

Because of this impairment, Mr. Sproull could not return to work as a holdman as he could not safely climb ships' ladders, which may involve drops of 50 feet or more, and he was restricted to dock

work. App. D-2, D-6. In order to maximize his hours after his return to work, Mr. Sproull switched his work to dayside dock jobs. Previously, he had worked nights as a holdman and took two hour tie-up or line jobs during the day. He switched to dock jobs on days because there were no night dock jobs available. As a result, he was no longer available for the line jobs which had been 15 percent of his pre-injury hours. Also, as a result of switching to day jobs, Mr. Sproull had to take a pay cut of one-third from the night pay rate. App. D-2, D-6.

Because of his inability to work as a holdman and the unavailability of line jobs to him, the ALJ found that Mr. Sproull's injury and disability affected his ability to work as a longshoreman. He calculated that his actual earnings for the three years after he was medically stationary, after adjustment for union contract increases, represented his post-injury wage earning capacity, and he based Mr. Sproull's award on that figure. App. D-5-6. In the alternative, he also found that the loss of line jobs to Mr. Sproull supported the award of permanent partial disability. App. D-8. The Benefits Review Board and the Ninth Circuit affirmed the ALJ's award on the grounds that there was substantial evidence in the record to support

it, and that it was legally correct. App. C-17-18, A-6.

2.

Average Weekly Wage Issue

In regard to calculation of his pre-injury average weekly wage, Mr. Sproull contended before the ALJ that vacation pay, which he earned before his injury but which he received after it, should be part of his pre-injury average weekly wage. Longshore workers on the Pacific Coast earn vacation pay based on their work hours in a calendar year. Instead of receiving vacation time, they receive a certain number of weeks of pay based on their work hours and seniority, and they receive this the first week in April following the calendar year in which they earned it. Because Mr. Sproull had earned the vacation pay in the calendar year 1984 which he received in April, 1985, the ALJ considered this as part of his earnings prior to his injury of January 10, 1985. App. D-3-4. The Benefits Review Board reversed this, then was evenly split on this issue on reconsideration. App. C-9-11, B-19-22. The Ninth Circuit reversed the Benefits Review Board and reinstated the ALJ's decision. App. A-6-8.

3.

Penalty Issue

On the issue of the 20 percent penalty on interest, the court of appeals held that the interest which the ALJ awarded on past due benefits owing to Mr. Sproull was compensation pursuant to the definition of "compensation" in 33 U.S.C. § 902 (12). Therefore, it ruled that failure to pay this within ten days of the filing of the ALJ's award supported the imposition of the mandatory 20 percent penalty pursuant to 33 U.S.C. § 914 (f). App. A-11-12.

The carrier claims the Ninth Circuit rejected the statutory definition of "compensation" in 33 U.S.C. § 902 (12). Pet. for cert., pp. 27-28. This is not correct. The question before the Ninth Circuit and the lower tribunals was whether "compensation" included interest on an award. The statute does not specifically include or exclude interest.

REASONS FOR NOT GRANTING THE PETITION FOR CERTIORARI

The carrier contends that the Ninth Circuit erred in affirming the ALJ by including Mr. Sproull's 1984 earned vacation pay in his pre-injury average weekly wage and in adjusting his post-injury

earnings for union contract wage increases. It also contends the Ninth Circuit and the Benefits Review Board erred in holding that the 20 percent statutory penalty pursuant to 33 U.S.C. § 914 (f) applied to the carrier's failure to pay interest on an award within ten days of the filing of the award. It bases its petition to this Court on the premise that the Ninth Circuit incorrectly deferred to the Director on each of those issues. Pet. for cert., p.11.

That is not correct. While it deferred to the Director's position on the penalty issue, it did not do so on the other two issues. App. A-5-8, A-11-12. This Court should also note that the claimant's position on the penalty issue was the same as the Director's position, and in fact is the only position which is compatible with an orderly and reasonable construction of interest under the Longshore and Harbor Workers' Compensation Act.

1.

The inclusion of the claimant's 1984 vacation pay in his pre-injury earnings is consistent with the language of 33 U.S.C. § 910 (c), and does not conflict with the rulings of other circuits.

The carrier tries to create a conflict in the circuits by calling Mr. Sproull's vacation pay, which he received in April, 1985, but

which he in fact earned based on his hours in the calendar year 1984, "post-injury earnings." Pet. for cert. pp. 13-14. They were not post-injury earnings. They were pre-injury earnings, which the claimant earned before he was hurt. Simply because he received them after his injury does not make them post-injury earnings. If Mr. Sproull had been killed instead of injured on January 10, 1985, his estate would have received his 1984 vacation pay. Would the carrier contend that this was post-death earnings or post-death receipt of pre-death earnings?

The reason no lower court or tribunal discussed *Tri-State Terminals v. Jesse*, 596 F.2d 752 (7th Cir. 1979), or *Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319 (D.C. Cir.), *cert denied*, 479 U.S. 1094 (1986), is that neither case applied to the present one. The present case, unlike *Jesse, supra*, did not involve the use of post-injury earnings in calculating a pre-injury average weekly wage. *Walker, supra*, does not apply to this case either. Unlike the claimant in *Walker*, Mr. Sproull did not ask the ALJ to use post-injury earnings in calculating his average weekly wage. He asked the ALJ to use post-injury receipt of pre-injury earnings to calculate his average weekly wage and the ALJ and Ninth

Circuit agreed with this. App. A-7-8, D-3-4.

The Benefits Review Board based its decision reversing the ALJ on this issue on the administrative burden of waiting for receipt of claimant's vacation pay to finalize the average weekly wage. App. C-11 n. 3, B-18-21. However, this was not a burden to the ALJ in this case and there is nothing in this case which requires this procedure in every case under the Longshore and Harbor Workers' Compensation Act. App. A-7. In fact, it is an unusual case where the claimant is hurt between January 1, after he has earned his vacation pay, and April 7, when he received it, that this is usually appropriate.

This Court should note that the court of appeals did not mandate this procedure in every case under the Longshore and Harbor Workers' Compensation Act. It simply affirmed the ALJ's use of this procedure in this case as a reasonable and legally appropriate one. Because the ALJ found no impracticality in using post-injury receipt of pre-injury vacation pay in the claimant's average weekly wage calculation, the Ninth Circuit affirmed his findings. App. A-7. The parable of "administrative headaches" the carrier predicts is highly unlikely and is not something the lower

court's opinion will cause.

The claimant is not aware of another published opinion on this exact issue, and certainly no court of appeals opinion is in conflict with this case. However, the principle of including post-injury receipt of pre-injury earnings in a claimant's average weekly wage calculation should be the rule and not the exception. It is not uncommon that a claimant is hurt in the midst of a pay period and could receive as much as 13 days of pay after an injury. Even the carrier presumably would not contend that a court should exclude this from a claimant's average weekly wage.

However, this is no different from what the ALJ and the court of appeals did in the present case. They simply included in the claimant's pre-injury average weekly wage what he in fact had earned prior to his injury. This is consistent with every basic principle under the Longshore and Harbor Workers' Compensation Act and should not require this Court's review.

2.

The court of appeals holding regarding the claimant's post-injury wage earning capacity is reasonable and logical and every

circuit which has discussed this issue agrees with the Ninth Circuit ruling.

The ALJ held that he had to reduce Mr. Sproull's post-injury earnings to pre-injury wage rates so that he was using a common denominator in comparing pre and post-injury wage earning capacity. App. D-7. The Benefits Review Board has required this, and four other circuits which have discussed this issue have agreed with the Benefits Review Board and the Ninth Circuit on it. *La Faille v. Benefits Review Board*, 884 F.2d 54, 61 (2d Cir. 1989); *White v. Bath Iron Works Corp.*, 812 F.2d 33, 35 (1st Cir. 1987); *Walker, supra*; *McCabe v. Sun Shipbuilding & Dry Dock Co.*, 602 F.2d 59, 63 (3d Cir. 1979); *Devillier v. National Steel and Shipbuilding Co.*, 10 BRBS 649, 657 (1979). In fact, no circuit has ever held in accordance with the carrier's position, and it cannot even cite a dissenting opinion anywhere in its favor. When discussing this issue, the First Circuit stated that it was difficult to believe the employer was serious about advancing this contention. *White, supra*, 812 F.2d at 35.

The reason for this is obvious. As the First Circuit stated, if a worker was working 40 hours per week at six dollars per hour

before his injury, this would be equal to a pre-injury average weekly wage of $240. If, as a result of his injury, he was limited to 20 hours per week, but there was a wage increase to 12 dollars per hour, the carrier would contend he had no loss of wage earning capacity because he was still able to earn $240 per week. *White, supra*, 812 F.2d at 35. To counter the effect of post-injury contract wage raises and inflation, the Benefits Review Board and each of the five circuits which have ruled on this issue require that a fact-finder reduce post-injury wages to pre-injury wage rates. The ALJ in the present case did this, and it is consistent with fairness, common sense and the holdings of every circuit on this issue.

Moreover this Court stated recently that in evaluating a change in a claimant's wage-earning capacity, an ALJ had taken care to account for inflation and risk of job loss. Its statement suggested this was legally proper. *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. ___, 115 S.Ct. 2144, 2150, 132 L.Ed 2d 226 (1995).

This Court should note that the ALJ held in this case that without adjusting Mr. Sproull's post-injury earnings to pre-injury rates, his post-injury earnings were not a fair and reasonable measure of his earning capacity. App. D-7-8. In other words, before a court

determines a claimant's fair and reasonable post-injury wage earning capacity, it must use comparable pre and post-injury wage rates.

Even if an appellate tribunal or court had disagreed with this legal concept, still it would have had to affirm the ALJ's finding on the permanent partial disability issue. He held, in the alternative, that if he had focused on the hours Mr. Sproull "lost" as a linesman, which the injury caused, the result would have been the same. This still would have resulted in an approximate 15 percent loss of wage earning capacity. App. D-8. The carrier does not challenge this finding in this Court. Thus, even if the ALJ had not reduced Mr. Sproull's post-injury earnings to pre-injury wage rates, he would have made the same findings of fact.

The carrier contends that the statute requires a court to use actual earnings and not adjusted earnings in calculating a post-injury wage earning capacity. Pet. for cert., pp. 17-19. The ALJ did use actual earnings, but held that actual post-injury earnings must be based on the same wage rates as pre-injury earnings in calculating permanent partial disability.

Because this position is so obviously reasonable and fair and because every other circuit has agreed with it, it is inappropriate for

this Court to accept certiorari and use its time and energy to review this decision.

3.

The Longshore and Harbor Workers' Compensation Act compels a penalty for failure to pay an award of interest within ten days and there is no conflict in the circuits on this issue.

The third issue in the petition for certiorari is whether a carrier's failure to pay an ALJ award of interest within ten days of the filing of the award requires the imposition of the statutory 20 percent penalty pursuant to 33 U.S.C. § 914 (f). The carrier is attempting to change this issue to one of whether and to what extent a court may defer to the Director in interpreting the Longshore and Harbor Workers' Compensation Act.

This Court should note that the carrier did not object to the Director's participation on this issue or to deference to the Director on this issue in the court of appeals, and the Benefits Review Board did not base its decision below on deference to the Director. Carrier's Br. to Ninth Cir., p. 33; App. C-22-24. In fact, the carrier conceded in its brief that the Director had standing to participate on this issue before the court of appeals and that the court of appeals

could defer to the Director's position if Congress had not spoken, if her interpretation was reasonable and if she presented it in a manner which called for deference. Carrier's Br. in Ninth Cir., p. 33.

Stevedoring Services stated in its brief to the Ninth Circuit:

> Here, the only issues that implicate the Director's responsibilities are SS of A's entitlement to relief from the Special Fund and the Board's interpretation of the LHWCA to require a 20% penalty on interest. Under *Newport News*, the Director is entitled to be heard, but only on those two issues, and to be deferred to, but only if Congress has not spoken, if her interpretations of the LHWCA are reasonable, and if they are presented in a manner that calls for deference.

Carrier's Br. in Ninth Cir., p. 33.

Having conceded this issue below, the carrier may not now argue in this Court that the lower court committed legal error.

This third issue is one of reasonable statutory interpretation which the claimant urged below, and in which this Court does not need to become involved. No other circuit has ruled on this issue so there is no conflict to resolve. The issue very simply is whether interest is compensation under the Longshore and Harbor Workers' Compensation Act so that a carrier must pay it as part of an award,

even if it appeals the award to the Benefits Review Board or to a court of appeals.

This Court should note that the question of whether a court may award interest is not before this Court. The carrier never raised this issue below. Rather the carrier contends that interest on a worker's past-due benefits is not "compensation" under the Longshore and Harbor Workers' Compensation Act, and it does not need to pay this until an award is final and a carrier has exhausted all of its appellate rights.

Under the Longshore and Harbor Workers' Compensation Act a carrier or employer must pay all compensation within ten days of the filing of an award unless a court issues a stay. 33 U.S.C. § 921(c). An appeal protects the carrier's legal positions, but it does not stay payment of compensation benefits. If a court holds that interest is not compensation, this would mean that a carrier could appeal an award and not pay the interest owed until its appeal rights expired. In the present case, this would mean that the carrier would not have had to pay the interest even by today, which is over 12 years since the injury.

The carrier anticipated this argument in its petition to this

Court, and stated that Congress in 33 U.S.C. § 921 (d) authorized enforcement of final compensation orders. Pet. for cert., p. 28. However, if interest is not compensation, as the carrier contends, an award of interest is not a final "compensation" order. If it is not compensation, it would not be payable until the award is final and all appeal rights have expired, as is the case with awards of attorney fees and costs. *See, Thompson v. Potashnick Construction Co.*, 812 F.2d 574 (9th Cir. 1987).

Congress in requiring payment of compensation within ten days of an award and in strictly limiting the availability of stays intended prompt payment of benefits to the injured worker under the Act. 33 U.S.C. § 914 (f). These benefits consistently since 1971 have included interest on a worker's past due benefits. *Foundation Constructors, Inc., v. Director, OWCP*, 950 F.2d 621 (9th Cir. 1991); *Quave v. Progress Marine*, 912 F.2d 798 (5th Cir. 1990), *cert. denied*, 500 U.S. 916 (1991); *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556 (1978), *aff'd in pertinent part and rev'd on other grounds, sub nom., Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979); *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225 (5th Cir. 1971), *cert.*

denied, 406 U.S. 958 (1972); *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984), *aff'd on reconsideration*, 17 BRBS 20 (1985). During this period, there have been two legislative overhauls of the Longshore and Harbor Workers' Compensation Act, and Congress has not changed this judicial requirement of interest. Pub. Law 98-426, 98 Stat. 1654, effective September 28, 1984; Pub. Law 92-576, 86 Stat. 1251, effective October 27, 1972. The carrier by asking this Court not to include past-due interest as part of a claimant's compensation in effect is asking this Court for authority not to pay interest until a claim finally concludes after all appeals. As the present case illustrates, this can take over 12 years. The very principle which the carrier is asking this Court to approve is the right to delay paying interest to an injured worker for as long as 12 years under the guise that interest is not compensation.

If the Director had been the only party who had contested this issue on appeal or the carrier had objected to the Director's participation on this issue, this might be an appropriate case for this Court to review the question of deference to the Director. However, the claimant originally appealed this issue to the Benefits Review Board, the carrier appealed it to the Ninth Circuit where both the

claimant and the Director opposed the carrier's position, and the issue is not one which appears controversial or that other circuits might disagree with the Ninth Circuit. It is unlikely that any court, absent an explicit directive from Congress, would allow a carrier to delay payment of interest in an ALJ award for any length of time, much less for over 12 years. However, that is exactly what the carrier wants this Court to approve.

Although the Ninth Circuit stated it was deferring to the Director on this issue, the Director and the claimant had the same position. The claimant argued that compensation under the Act included all benefits to him whether they flowed from the specific language of the statute or from well-established judicial interpretation. Even if the court of appeals had not deferred to the Director's reasonable interpretation as the basis for its opinion, this was also the claimant's position which was equally as reasonable as the Director's.

No other circuit has ruled on this issue, and the Director's and the claimant's position is not only reasonable, but is absolutely necessary to enforce prompt payment of interest under the Act. The carrier does not have a reasonable position once it concedes that

interest is necessary to compensate injured workers, as it has done in this case.

It appears that the carrier would like this Court to review the question of whether the Longshore and Harbor Workers' Compensation Act allows interest on past-due compensation benefits. However, that issue is settled and the carrier did not preserve it for review in this case in any event. *See, supra*, pp. 10 and 11. Once that issue is settled, the next step that interest is part of an injured worker's compensation is logical and reasonable. Under the guise of the question of deference to the Director, the carrier is asking this Court to review this case. Because it did not preserve this issue below and the underlying result is inherently reasonable, this Court should deny the petition for certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny the carrier's petition for certiorari.

Respectfully submitted,

CHARLES ROBINOWITZ
Counsel of Record
2962 Pacwest Center
1211 S.W. Fifth Avenue
Portland, OR 97204
(503) 226-1464
Attorney for Respondent Charles S. Sproull